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No. 91-942

In the Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH RICHARDSON AND NORMAN J. TRAPP,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's failure to object to the court's subject matter jurisdiction early in the litigation waived the objection.

2. Whether the courts below correctly determined that the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), deprived the courts of subject matter jurisdiction over petitioners' suits.

3. Whether the district court correctly applied principles of Washington state law in adjudicating petitioners' claims under the FTCA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 943 F.2d 1107. The opinion of the district court (Pet. App. A25-A46) and the subsequent order denying petitioners' motion for reconsideration (Pet. App. A16-A24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. The petition for writ of certiorari was filed on November 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioners Kenneth Richardson and Norman J. Trapp have been litigating this case since they were injured by lightning over sixteen years ago. Their misfortune began on May 10, 1975, when they were moving aluminum irrigation pipes on a farm that Trapp was renting. Suspended thirty feet above them were three power transmission lines owned and operated by the Bonneville Power Administration (BPA). It was undisputed that the accident could have been prevented if the power line had been equipped with an overhead ground system.

2. a. Petitioners filed separate suits under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that their injuries had been caused by the negligence of the BPA, an agent of the United States. After trial of petitioner Richardson's case, the district court held that, under Washington law, power line operators must use "the highest degree of care compatible with practical operation." Pet. App. A136. The court found that the BPA had met that standard of care because the potential benefits were not warranted by the high cost of installing ground wires over all power lines. Pet. App. A134.

The court of appeals reversed and remanded, holding that the standard of care under state law was higher than that employed by the district court. Washington law, it held, requires power line operators to use "the highest degree of care that human prudence is equal to." *Richardson* v. *United States*, 645 F.2d 731 (9th Cir. 1981) (*Richardson I*). Pet. App. A117.

b. Prior to petitioner Richardson's second trial, his case was consolidated with petitioner Trapp's. Again the issue of liability was tried, this time using

the more exacting standard of care specified by the court of appeals in *Richardson I*. Prior to the filing of an opinion, however, a Washington state appellate court criticized the decision in *Richardson I* and set forth a standard of care that was very similar to that rejected in *Richardson I*. See *Keegan* v. *Grant County Pub. Util. Dist.*, 661 P.2d 146, 149-150 & n.2 (Wash. Ct. App. 1983). Nonetheless, the district court held that it was bound by the law of the case and held the government to the standard of care set forth in *Richardson I*. It found the government liable. Pet. App. A87-A101. In a supplemental opinion, the district court considered and rejected applicability of the discretionary function exception to the case. Pet. App. A85.

The government appealed and the court of appeals again reversed. It held that, in light of the state court's decision in *Keegan*, the original trial of Richardson's case had employed the proper standard of care. *Richardson* v. *United States*, 841 F.2d 993 (9th Cir. 1988) (*Richardson II*) (Pet. App. A71). Rather than require another trial in the consolidated action, the court of appeals (by subsequent order) left to the district court's discretion whether a full trial was necessary. Pet. App. A52-A53.

c. On remand, the district court declined to relitigate factual issues but, in an evidentiary hearing, heard arguments as to (1) whether petitioners' claims were barred by the discretionary function exception, and (2) how to apply the *Richardson II* standard of care to this case. The district court then dismissed the consolidated action, concluding that the BPA's decision not to build an overhead ground system near the site where the accident occurred fell within the discretionary function exception to the

FTCA, 28 U.S.C. 1346(b) and 2680(a). Pet. App. A25-A46. In its order denying reconsideration, the district court also held that, even if the discretionary function exception were not applicable, the government would still not be liable because it had met the standard of care set out in *Richardson II*. Pet. App. A16-A24. The court of appeals affirmed solely on discretionary function exception grounds. *Richardson* v. *United States*, 943 F.2d 1107 (9th Cir. 1991) (*Richardson III*). Pet. App. A15.

ARGUMENT

Petitioners raise three issues. The first is a question of well-settled law. The second is fact-bound. And the third was not addressed by the decision below. None involves a division in circuit authority; none presents questions of overriding national importance; and as to each, the disposition of the court of appeals is unassailably correct. Accordingly, further review in this Court is unwarranted.

1. Petitioners contend that the United States waived its right to seek dismissal of the action for lack of subject matter jurisdiction. The government asserted the absence of subject matter jurisdiction in its pleadings and relied upon this defense in the district court prior to the second and third appeals. It did not, however, rely upon this defense during the first two appeals in the litigation. Pet. 10-18. Petitioners contend that this procedural history should have led the lower courts to hold that the United States was precluded from raising "lack of subject matter jurisdiction under the discretionary function exception to the FTCA." Pet. 28. The court of appeals' contrary decision conforms to this Court's precedents establishing that objections to subject mat-

ter jurisdiction cannot be waived and is consistent with the decisions of all other courts of appeals.

Because subject matter jurisdiction concerns the courts' authority to hear the case and not the rights of the litigants, parties to litigation cannot create subject matter jurisdiction by failing to raise the issue, and the absence of subject matter jurisdiction may be raised by any party or the court at any point in the proceeding. E. Chemerinsky, *Federal Jurisdiction* § 5.1, at 219 (1989). See *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings."); *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951) (principles of estoppel do not apply); *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972) (consent of the parties cannot create subject matter jurisdiction). The rule barring waivers of subject matter jurisdiction is fully applicable here, because the courts lack subject matter jurisdiction over cases that fall within the discretionary function exception to the FTCA.

It is axiomatic that federal courts lack subject matter jurisdiction over suits against the government in the absence of an affirmative waiver of sovereign immunity. *United States* v. *Orleans*, 425 U.S. 807, 814 (1976). Although the Federal Tort Claims Act waives the government's immunity to, and grants courts jurisdiction over, a limited class of negligence claims against the government, Section 2680(a) excepts from the waiver of immunity and grant of jurisdiction all cases based upon the government's exercise of a discretionary function. 28 U.S.C. 2680 (a) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * any

claim based upon * * * the exercise or performance or the failure to exercise or perform a discretionary function or duty * * *."); *S.A. Empreso de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984) (discretionary function exception exempts a certain class of claims "from the Act's broad waiver of immunity" and "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain government activities from exposure to suit by private individuals."). Accordingly, where a case falls into the discretionary function exception, there is no waiver of sovereign immunity and subject matter jurisdiction is lacking. See *Berkovitz* v. *United States*, 486 U.S. 531, 535 (1988) (review of disposition of "motion to dismiss the suit for lack of subject-matter jurisdiction on the ground that the agency actions fell within the discretionary function exception of the FTCA."); *Orleans*, 425 U.S. at 814 (where the government has not waived its sovereign immunity, the courts lack subject matter jurisdiction). See also *Dalehite* v. *United States*, 346 U.S. 15, 37 n.32 (1953) (citing with approval *Coates* v. *United States*, 181 F.2d 816, 820 (8th Cir. 1950), which held that, where the discretionary function exception applied, "no jurisdiction" existed.).

Petitioners nevertheless seem to argue that the discretionary function exception is not an exception to the FTCA's waiver of immunity and grant of jurisdiction but an affirmative defense to liability that may be waived. See Pet. 28 (referring to discretionary function exception as an "affirmative defense"); Pet. 10-18 (arguing waiver and consent). Petitioners rely almost exclusively on the 1952 decision of the Seventh Circuit in *Stewart* v. *United*

States, 199 F.2d 517, holding that the government had waived its claim that the discretionary function exception barred suit by failing to raise it earlier. Pet. 15-16. The *Stewart* decision, however, predates this Court's decisions in *Dalehite*, *Berkovitz*, and *Varig*, which construe the discretionary function exception as taking a class of cases outside the congressional waiver of sovereign immunity needed to confer subject matter jurisdiction on the courts. Indeed, as the court of appeals below pointed out, no court of appeals follows *Stewart* today—not even the Seventh Circuit. Pet. App. A13-A14. Instead, they universally agree that, where a case falls within the discretionary function exception to the FTCA, subject matter jurisdiction is lacking.[1] Review of this

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[1] See, *e.g.*, *Kelly* v. *United States*, 924 F.2d 355, 360 (1st Cir. 1991) ("When a claim is covered by the discretionary function exception, it must be dismissed for lack of subject matter jurisdiction."); *Birnbaum* v. *United States*, 588 F.2d 319, 322 (2d Cir. 1978) ("If the claims in suit fall within one of the statutory exceptions [of which the discretionary function exception is one], the district court lacks subject matter jurisdiction."); *Gibson* v. *United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972) ("It seems settled that any objection raised by the defendant which is based upon the exceptions listed in § 2680 goes to the issue of jurisdiction over the subject matter."); *Piechowicz* v. *United States*, 885 F.2d 1207, 1209 n.1 (4th Cir. 1989) ("The district court held, as it should, that the application of § 2680(a) deprived it of subject matter jurisdiction over the claims against the United States."); *Jet Indus.* v. *United States*, 777 F.2d 303, 306 (5th Cir. 1985) ("[T]he discretionary function exception of the FTCA deprives the district court of subject matter jurisdiction."); *Carlyle* v. *United States, Department of the Army*, 674 F.2d 554, 557 (6th Cir. 1982) ("[T]he courts have no jurisdiction over any claim based on the exercise or performance or failure to exercise or perform these discretionary functions."); *Hylin* v.

issue is accordingly unwarranted.[2]

United States, 755 F.2d 551, 554 (7th Cir. 1985) (per curiam) (Because the defendant's enforcement activities "are protected by the discretionary function exception" the case must be dismissed "for lack of subject matter jurisdiction."); *Zigler* v. *United States*, No. 90-3796 (7th Cir. Jan. 17, 1992), slip op. 3 ("Because the statute, 28 U.S.C. § 2680(a), does not waive sovereign immunity with respect to discretionary function claims, the trial court, at least conceptually, lacked subject matter jurisdiction in the event that the government's conduct here involved the exercise of a discretionary function."); *Konecny* v. *United States*, 388 F.2d 59, 62-63 (8th Cir. 1967) (discretionary function exception is a limit on the waiver of sovereign immunity and accordingly limits the court's jurisdiction to hear the suit); *Roberts* v. *United States*, 887 F.2d 899, 900 (9th Cir. 1989) ("[I]f the discretionary function applies, the claims should be dismissed for lack of jurisdiction."); *Baird* v. *United States*, 653 F.2d 437, 440 (10th Cir. 1981) (discretionary function exception of Section 2680(a) "limits the Government's waiver of sovereign immunity. It therefore poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction."), cert. denied, 454 U.S. 1144 (1982); *Hart* v. *United States*, 894 F.2d 1539 (11th Cir. 1990) ("[T]he United States' efforts * * * were discretionary functions and * * * the court below had no subject matter jurisdiction to consider a challenge to those functions."). See *Jayvee Brand, Inc.* v. *United States*, 721 F.2d 385, 387-390 (D.C. Cir. 1983) (where FTCA does not grant jurisdiction because an exemption applies, jurisdiction is lacking).

[2] *Stewart* is, in any event, distinguishable. There, the government raised the issue of jurisdiction for the first time after the issue of liability had been resolved in the court of appeals and district court and the mandate had issued. 199 F.2d at 518. Consequently, the government's assertion of lack of subject matter jurisdiction at that juncture was tantamount to a collateral attack on the judgment. Such attacks are rarely permitted. E. Chemerinsky, *supra*, § 5.1, at 219 (While subject matter jurisdiction may be raised at any point in a proceeding, it is not normally "a basis for a collateral attack on a judg-

2. Petitioners next argue that the discretionary function exception to the FTCA does not apply here. Specifically, they contend that the BPA's decision not to equip its power lines with an overhead ground system to divert lightning strikes was not the type of decision Congress meant to insulate from judicial review. But they do not quarrel with the court of appeals' statement of the law, see Pet. 19; they just disagree with its application of the law to the particular facts of this case. Because their contention is both fact-bound and wrong, further review is unwarranted.

The court of appeals properly analyzed this issue using the two-part test announced in *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). See Pet. App. A7-A11. The first step is to "consider whether the action is a matter of choice for the acting employee," 486 U.S. at 536, *i.e.*, whether it is "discretionary." Petitioners do not dispute that the BPA's action here was "a matter of choice," as no statute, regulation or policy prohibited the course the BPA selected. Pet. App. A9; Pet. 20. They only dispute the court of appeals' application of the second prong, under which it was required to decide whether the challenged decision was "based on considerations of public policy." 486 U.S. at 537. Where decisions are based on such considerations, the discretionary function exception deprives the courts of jurisdiction over the suit, as Congress wished to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political

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ment; that is, once a judgment is entered it cannot be attacked, except on appeal, on the ground that the court lacked subject matter jurisdiction." (citing *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192 (1825))).

policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

Petitioners claim that the BPA's decision not to install overhead ground wires failed this second prong because it did not involve "considerations of public policy." They argue that the Ninth Circuit should have followed its own decision in *Summers* v. *United States*, 905 F.2d 1212 (1990), in which the panel found the exception inapplicable, rather than its decision in *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018, 1021 (1989), upon which the decision below relied. Pet. 18-20. The question of whether one Ninth Circuit decision or another controls a case is, of course, a matter of concern to the Ninth Circuit; but it does not merit this Court's attention. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the decision below was correct. *Summers* involved the Park Service's failure to provide warning signs about the dangers of stepping on hot coals in fire circles on federal beaches. The court held that this failure was not the result of "choices among political, economic, and social factors" but was rather "a departure from the safety considerations established in [Park] Service policies." 905 F.2d at 1216. It therefore held that the decision was not covered by the discretionary function exception to the FTCA. *Ibid.* Here, in contrast, the decision of where to install overhead ground wires was not a departure from established considerations but "a design decision based on technical, economic, and social considerations," Pet. App. A11, including the likelihood of lightning strikes, the importance of the equipment to be protected, and the cost of installing the overhead ground wires on all similar areas. Pet.

App. A10 & n.4. Because the decision was based on policy considerations, including the economic costs and social benefits of adding overhead ground lines, the court of appeals' conclusion that the discretionary function exception applied was correct.

3. Finally, petitioners object to the trial court's application of the standard of care as interpreted in *Richardson II*. Pet. 20-28. However, because the court of appeals below did not reach this state law question and instead affirmed dismissal on jurisdictional grounds, Pet. App. A15, it is not an appropriate basis for further review. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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